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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 498

THE FEDERAL LAND BANK OF BERKELEY,
PETITIONER,

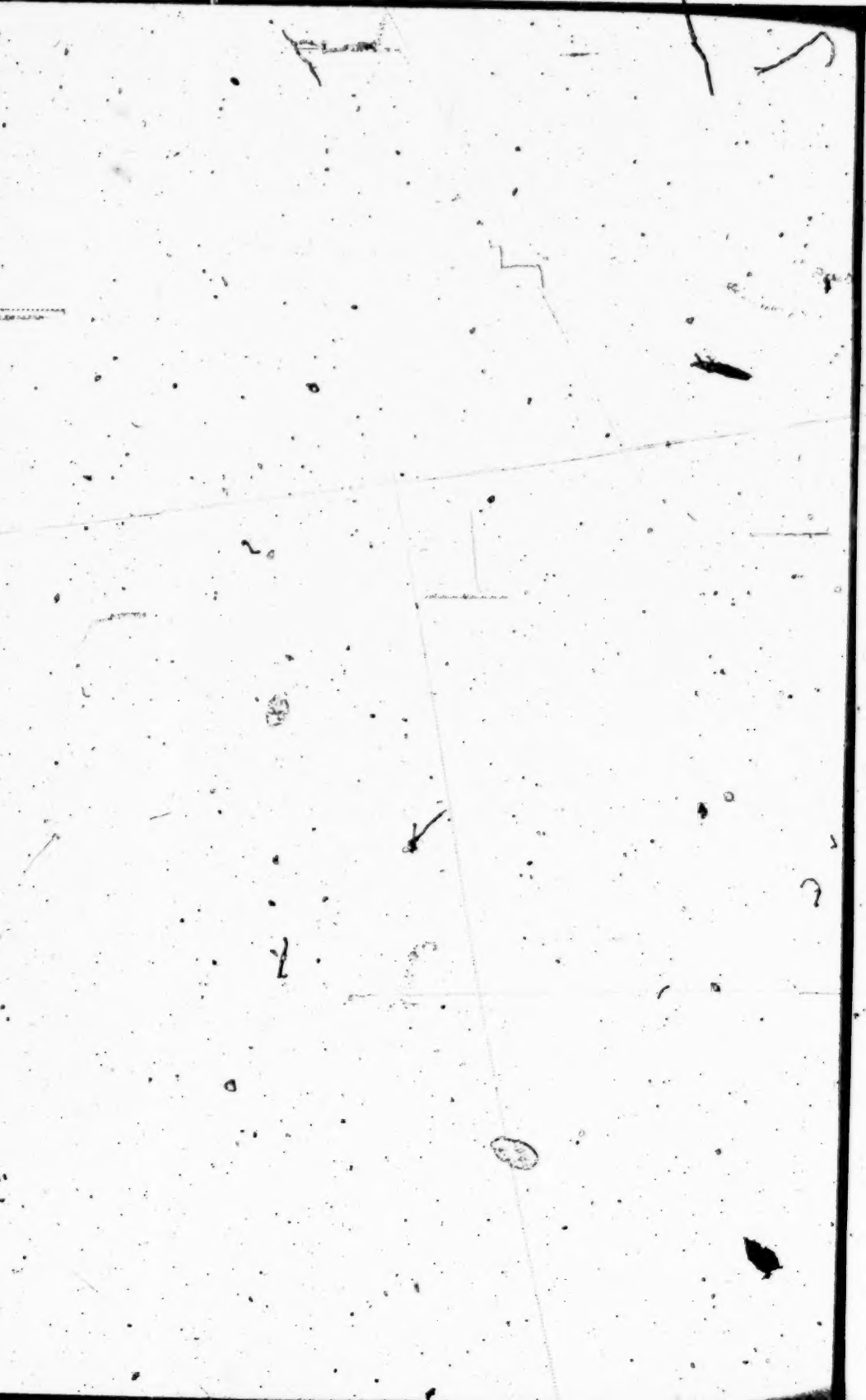
vs.

SAMUEL S. WARNER ET UX. ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1933

CERTIORARI GRANTED NOVEMBER 20 1933



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[fol. 1] In Superior Court of Maricopa County in and for the State of Arizona

#35727

The Federal Land Bank of Berkeley, a Corporation, Plaintiff,

vs.

Samuel S. Warner, also known as S. S. Warner, also known as Sam S. Warner, and Lydia S. Warner, his wife; The Salt River Valley National Farm Loan Association, a corporation; John D. Calhoun, County Treasurer and Ex-Officio Tax Collector of Maricopa County, State of Arizona; First Doe, Second Doe and Third Doe, Defendants

Amended Complaint to Foreclose Mortgage

Plaintiff complains and alleges:

I

The plaintiff is now and at all times alleged has been a corporation organized and existing under the laws of the United States of America, with its principal place of [fol. 2] business in the City of Berkeley, State of California; that defendant The Salt River Valley National Farm Loan Association is a corporation organized and existing under the Federal Farm Loan Act; that said defendants Samuel S. Warner and Lydia S. Warner are husband and wife; that said defendant John D. Calhoun is the duly elected, qualified and acting County Treasurer and Ex-Officio Tax Collector of the County of Maricopa, State of Arizona; that plaintiff does not know the true names of the defendants sued herein as First Doe, Second Doe and Third Doe, and prays that it may insert the true names of said defendants as soon as ascertained.

II

That Samuel S. Warner and Lydia S. Warner, on or about November 1, 1922, executed and delivered to said

plaintiff a certain promissory note in writing, in words [fol. 3] and figures as follows, to-wit:

(Here insert original note which is marked Plaintiff's Exhibit "A").

That said Samuel S. Warner and Lydia S. Warner, to secure payment of said promissory note, did execute and deliver to plaintiff a real estate mortgage, which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and that said mortgage was thereafter, on the 4th day of December, 1922, duly recorded in Book 153 of Mortgages, at pages 258-261 thereof, in the office of the County Recorder of Maricopa County, State of Arizona; that a copy of the said mortgage, with the endorsement and guarantee thereof is hereunto annexed and is in words and figures as follows, to-wit:

(Here insert original mortgage which is marked Plaintiff's Exhibit "B").

III

[fol. 4] That the installments of $234.00 each that became due and owing on said note on November 1, 1930, and May 1, 1931, respectively, have not been paid. That the Executive Committee of the plaintiff herein, being duly authorized by its Board of Directors, and acting under and by virtue of the provisions contained in said mortgage that in case of default of any of the obligations thereof the whole of the indebtedness secured by said mortgage might be declared payable, duly declared the whole of said mortgage indebtedness due and payable on the third day of June, 1931, and duly notified the mortgagors herein and The Salt River Valley National Farm Loan Association of such action. That more than thirty days have elapsed since such notification and The Salt River Valley National Farm Loan Association has not made good such defaults, either by payment thereof, or by the substitution of an equal amount of additional farm loan bonds.

IV.

[fol. 5] That no part of said note has been paid except $657.43 has been paid on principal and $2,852.57 has been paid as interest; that there is now unpaid from the makers

and guarantor of said note and mortgage, as named in Paragraph II, the following sums:

Unpaid principal, less delinquent installments . . . $6,074.57

Interest thereon at 5½% per annum from May 1, 1930, the date on which the last installment paid was due.

Delinquent installment due November 1, 1930 . . . . 234.00

Interest on said installment at 8% per annum from said date.

Delinquent installment due May 1, 1931 . . . . . 234.00

Interest on said installment at 8% per annum from said date.

That said mortgage provides that the mortgagor shall [fol. 6] pay all taxes and assessments before the same become delinquent and shall keep said property insured in the sum of $700.00, and that in default thereof the mortgagee may do so, and that any sum so paid out shall be repayable at once without demand and shall be secured by said mortgage.

That the said defendants failed to pay the State and County taxes on said property for the year 1930, and that in order to protect said property from said delinquent tax liens the plaintiff paid said taxes to the above-named County Treasurer and Ex-Officio Tax Collector of Maricopa County, said payment being in the sum of $185.86, which was the amount of the first installment of said tax, said payment being made on the 15th day of December, 1930, and upon which amount the plaintiff is entitled, under the terms of said mortgage, to interest at the rate of 7% per annum from the date of payment thereof, and in the sum of $185.86, which was the amount of the second installment [fol. 7] of said taxes, said payment being made on the 2nd day of June, 1931, and upon which amount the plaintiff is entitled, under the terms of said mortgage, to interest at the rate of 8% per annum from the date of payment thereof.

That the insurance on said property expired, or was about to expire, and that the defendants failed and neglected to renew the same as required by said mortgage, and that plaintiff, in order to protect said property from

fire hazard, was compelled to renew said insurance and to pay the premium therefor in the sum of $32.16. That said payment was made on the 2nd day of October, 1931, to Joyce & Company, Agents for the Fidelity-Phenix Fire Insurance Company, at Tempe, Arizona; that the plaintiff is entitled, under the terms of said mortgage, to interest on said amount at the rate of 8% per annum from the date of payment thereof.

[fol. 8] That plaintiff failed and neglected to pay the water charges levied by the Salt River Valley Water Users' Association against said property for water used thereon, and in order to protect the said property from the lien of said water charges plaintiff was compelled to pay, and did pay the same, to the Salt River Valley Water Users' Association in the sum of $356.77. That such payment was made on the 18th day of September, 1931, upon which amount the plaintiff is entitled, under the terms of said mortgage, to interest at the rate of 8% per annum from the date of payment thereof.

That said mortgage provides for a reasonable attorney's fee in this action and plaintiff alleges that a reasonable attorney's fee is the sum of $125.00. That the whole of said fee, if allowed by the Court, is to be paid to and be retained by the attorneys of record in this case.

[fol. 9] That no part of any of said sums has been paid.

V

That each and all of the defendants named herein, excepting the mortgagors and National Farm Loan Association above named claim to have a lien against, or interest, as trustees or otherwise, in the property described in said mortgage, or some part thereof, the nature or character whereof is unknown to this plaintiff; that such claim or interest is subsequent to and in all respects subject to the lien of the plaintiff under its mortgage as aforesaid.

Wherefore, plaintiff prays judgment: That each and all of the defendants and all persons claiming under them, or any of them, subsequent to the commencement of this action be foreclosed of all equity of redemption or other interest in the said mortgaged property and water stock; and for judgment against the makers and guarantor of said note [fol. 10] for the sums alleged in Paragraph IV hereof; that

the usual decree may be had for the sale of said mortgaged premises according to law and the practice of this court; that the premises may be sold as a whole; that the plaintiff, or any other party to this suit, may become the purchaser at said sale, and that the proceeds be applied in payment of the amount due the plaintiff, including attorney's fee and advances, costs and expenses of the sale, and costs of this suit; and that if there be any deficiency, that judgment therefor be entered against the defendants who made said mortgage and those who assumed and agreed to pay said mortgage and those who guaranteed said mortgage, all as alleged in Paragraph II hereof; and that the plaintiff have such further relief in the premises as this Court may deem meet and equitable.

Phillips, Holzworth & Phillips, Attorneys for Plaintiff.

[fol. 11] *Duly sworn to by Milton Rygh. Jurat omitted in printing.*

[fol. 12] IN SUPERIOR COURT OF MARICOPA COUNTY

ANSWER OF DEFENDANTS SAMUEL S. WARNER AND LYDIA S. WARNER TO AMENDED COMPLAINT

Come now Samuel S. Warner and Lydia S. Warner, two of the defendants named in the above-entitled action, and for answer to plaintiff's amended complaint in said action:

I

First. Admit the allegation in paragraph I of said complaint to the effect that these defendants are husband and wife. As to each of the other allegations in said paragraph I these defendants have not sufficient knowledge to enable them to either admit or deny said allegations, and they, therefore, demand that plaintiff be required to make strict proof thereof.

Second. Admit that they executed the note and the mortgage set out in paragraph II of said complaint; but deny [fol. 13] that they either signed or delivered said instruments, or either of the same, on or about the 1st day of November, 1922, and in this connection allege that said in-

struments were not signed, and said mortgage was not acknowledged, by them until the 28th day of November, 1922, and that said instruments were not finally executed by delivery thereof to or for the account of the plaintiff until on or about the 4th day of December, 1922.

Third. Deny each and every allegation contained in paragraphs III and IV of said complaint.

Fourth. Allege that they have no knowledge or information concerning any claim of lien or interest mentioned in paragraph V of said complaint and therein alleged to be claimed by each and all of the defendants named in said action, except these defendants and the defendant The Salt River Valley National Farm Loan Association; and for [fol. 14] such lack of information they neither admit nor deny said allegations and demand that plaintiff be required to make strict proof thereof.

Wherefore these defendants having fully answered plaintiff's amended complaint pray judgment of the court that plaintiff take nothing by its amended complaint and that these defendants go hence with their costs.

Chas. Woolf, Attorney for Defendants Samuel S. Warner and Lydia S. Warner.

II

Further answering said amended complaint, by way of set-off against the plaintiff, these defendants allege:

First. That the note and mortgage set out in said amended complaint, while dated November 1, 1922, were not finally executed by delivery thereof, to or for the account of plaintiff until on or about the 4th day of December, 1922.

[fol. 15] Second. That the principal mentioned in said note and mortgage, to-wit, Seven Thousand Two Hundred Dollars ($7,200.00) being the amount of said loan, was not paid in whole or in part by plaintiff to these defendants or for their account until on or about the 4th day of December, 1922.

Third. That while, as appears by the face of said note, the same draws interest at the rate of five and one-half (5½) per cent per annum, payable semi-annually, from the

date theerof, to-wit, November 1, 1922, these defendants are in justice and equity entitled to, and should be credited with interest on the amount of said loan, to-wit, $7,200.00 at the rate of 5½ per cent per annum for thirty-three (33) days, to-wit, for Thirty-six and 31/100 Dollars ($36.31).

Wherefore these defendants pray that Thirty-six and 31/100 Dollars ($36.31) be set off and credited against the [fol. 16] amount, if any, which the court may otherwise find to be due and owing from these defendants to plaintiff.

Chas. Woolf, Attorney for Defendants Samuel S. Warner and Lydia S. Warner.

III

Further answering said amended complaint, by way of set-off against the plaintiff, these defendants allege that as a condition precedent to the making of the loan evidenced by the note and mortgage set out in plaintiff's amended complaint the plaintiff required these defendants to pay to the defendant The Salt River Valley National Farm Loan Association from the proceeds of said loan Three Hundred Sixty Dollars ($360.00), that said association pay said $360.00 to plaintiff in payment for shares of plaintiff's capital stock, and that said stock be held by plaintiff as a part of the security for said loan. In this connection these de- [fol. 17] fendants allege that they complied with said condition and that said $360.00 was paid from the proceeds of said loan, as required by said condition, to plaintiff and applied in full payment for seventy-two (72) shares of plaintiff's said capital stock, and that said shares have at all times since said payment been, and now are, held by plaintiff as a part of the security for said loan; that these defendants have no knowledge or information as to the present value of said shares or as to the amount, if any, of any unpaid dividends or undistributed earnings thereon, but that plaintiff is in the full possession and control of all of the records and information from which the present value of said shares, including unpaid dividends and undistributed earnings thereon can be determined; and that in justice and equity plaintiff should disclose to these defendants and to the court all such information as may be neces- [fol. 18] sary to determine the present value of said shares, and that the amount of the value so determined should be

applied as a credit on the amount, if any, which the court may find due to plaintiff in this action.

Wherefore these defendants pray:

First. That plaintiff be required to disclose to the court and to these defendants any and all such records and information as may be necessary to determine the present value of said seventy-two shares of plaintiff's capital stock; and

Second. That the amount of the present value of said shares be determined by the court and set-off and credited against the amount, if any, which the court may otherwise find to be due and owing from these defendants to plaintiff.

Chas. Woolf, Attorney for Defendants Samuel S. Warner and Lydia S. Warner.

[fol. 19] IV

Further answering said amended complaint, by way of set-off against the plaintiff, these defendants allege that prior to the filing of said amended complaint these defendants paid to plaintiff Two Hundred Forty-four and 35/100 Dollars ($244.35) to apply on the water charges mentioned in paragraph IV of said amended complaint and therein alleged to have been made by the Salt River Valley Water Users' Association against the land described in the mortgage set out in said complaint for the use of water on said land and which plaintiff therein claims to have paid on the 18th of September, 1931.

Wherefore these defendants pray that Two Hundred Forty-four and 35/100 Dollars ($244.35) be set-off and credited against the amount, if any, which the court may otherwise find to be due and owing from these defendants to plaintiff.

Chas. Woolf, Attorney for Defendants Samuel S. Warner and Lydia S. Warner.

[fol. 20] In Superior Court of Maricopa County

Reply of Plaintiff

Comes now The Federal Land Bank of Berkeley, a corporation, the plaintiff in the above enfitled action, and for

reply to the further answer and set-off of the defendants Samuel S. Warner and Lydia S. Warner, to the plaintiff's amended complaint in said action:

I

This plaintiff, replying to the second answer of the defendants, Samuel S. Warner and Lydia S. Warner, admits that said note and mortgage are dated November 1, 1922, and alleges that on November 17, 1922, plaintiff remitted the net amount available under said loan, to-wit, the sum of $6,919.50 to Arizona Title Guarantee and Trust Company, at Phoenix, to be paid out by it for the said defendants [fol. 21] and for their use; that plaintiff was duly authorized in writing by said defendants to so remit said funds and to have them so paid out, and that Samuel S. Warner, one of said defendants, subsequently, to-wit on the 5th day of December, 1922, duly ratified the disposition of said funds and received the balance thereof from said Arizona Title Guarantee and Trust Company on behalf of said defendants.

Plaintiff denies that defendants were entitled to be credited with the sum of $36.31 interest for the period of 33 days, and alleges that said defendants were entitled to a rebate of interest for the period from November 1st, 1922 to November 17, 1922, the date of said remittance, and that such rebate was fully made and allowed at the date of the first installment called for by said note and mortgage, to-wit, on May 1st, 1923, in the sum of $18.70, said defendants paying as such first installment the sum of [fol. 22] $215.30 instead of $234.00.

II

Replying to said defendant's third answer this plaintiff alleges that under the provisions of the Act of Congress approved July 17, 1916, known and cited as the Federal Farm Loan Act, it is required that any person desiring to borrow on farm land mortgage with a Federal land bank shall make application to the local national farm loan association for membership therein and shall subscribe for shares of stock in such farm loan association to an amount equal to five per centum of the face of the

desired loan, said subscription to be paid in cash upon the granting of the loan. If the application for membership in said farm loan association is accepted and the loan is granted, said applicant shall, upon full payment thereof, become the owner of one share of capital stock in said loan [fol. 23] association for each $100.00 of the face of his loan, or any major fractional part thereof. Said capital stock in the national farm loan association so subscribed for by the applicant shall be held by said association as collateral security and for its protection under its indorsement of said loan. Further, under the provisions of Section 9 of said Federal Farm Loan Act it is provided that any person so securing a loan may, at his option, borrow from the Federal land bank through the national farm loan association the sum necessary to pay for such shares of stock subscribed for by him in the national farm loan association, such sum to be made a part of the face of the loan. That pursuant to the aforesaid provisions of said Federal Farm Loan Act the said defendants Samuel S. Warner and Lydia S. Warner, at the time of applying for said loan, did subscribe to 72 shares of the capital stock of [fol. 24] The Salt River Valley National Farm Loan Association, and did borrow from this plaintiff through the said The Salt River Valley National Farm Loan Association the sum of $360.00 necessary to pay for said shares of stock so subscribed for by them in said national farm loan association, and said sum of $360.00 was made a part of the face of the loan herein sought to be foreclosed. This plaintiff denies that said shares of stock so subscribed for by said defendants in The Salt River Valley National Farm Loan Association are held by it for collateral behind said loan, and alleges that said 72 shares of stock are held by said national farm loan association for its protection upon its indorsement of the loan of said defendants.

This plaintiff further denies that said defendants are entitled to a credit on said loan for the par value of said shares of stock of The Salt River Valley National Farm [fol. 25] Loan Association, or for a credit of the value of said shares so determined, or for any value to be credited upon said loan.

III

Replying to said defendants' fourth answer and set-off this plaintiff admits that on November 5, 1931 it received the sum of $244.35 on behalf of said defendants and admits that said defendants are entitled to a credit for this amount.

Richard W. Young, Phillips, Holzworth & Phillips,
Attorneys for Plaintiff.

Duly sworn by Milton Rygh. Jurat omitted in printing.

[fol. 26] IN SUPERIOR COURT OF MARICOPA COUNTY

DECREE IN FORECLOSURE

The above cause coming on regularly to be heard in open court this 5th day of March, 1932, before the court sitting without a jury, said cause having been duly and regularly [fol. 27] set for said date, and plaintiff, The Federal Land Bank of Berkeley, a corporation, appearing by its attorneys, Phillips, Holzworth and Phillips, and the defendants Samuel S. Warner and Lydia S. Warner, his wife, being represented by their attorney Charles Woolf, and it appearing to the court that the defendants The Salt River Valley National Farm Loan Association, a corporation, and John D. Calhoun, County Treasurer and Ex-Officio Tax Collector of Maricopa County, State of Arizona, have been duly and regularly served with the process of this court in the manner provided by law, and that said defendants have failed to appear, plead, demur or answer within the time provided by law, and that the default of each of said defendants has been duly and regularly entered by the clerk of this court; whereupon the court proceeded to the trial of this cause; and evidence, both oral and documentary, having [fol. 28] been introduced on behalf of both the plaintiff and said defendants Samuel S. Warner and Lydia S. Warner, his wife, and said matter having been argued to the court by the respective attorneys, and the court fully understanding the matter and being fully advised in the premises, finds:

1. That notice of the pendency of this action was duly recorded by the plaintiff in the Recorder's office of said Maricopa County, Arizona, on October 23, 1931.

2. That the defendants Samuel S. Warner and Lydia S. Warner, his wife, made and executed the note and mortgage as described in plaintiff's said complaint and amended complaint, and the defendant The Salt River Valley National Farm Loan Association, guaranteed the payment of the same in writing, which obligation has never been discharged.

3. That the installments of Two Hundred Thirty-Four [fol. 29] Dollars ($234.00) each that became due and owing on said note on November 1, 1930 and May 1, 1931 respectively, have not been paid. That the defendants failed to pay the state and county taxes on the property covered by said mortgage for the year 1930 and plaintiff was compelled to and did, on December 15, 1930, pay the first installment of said taxes in the sum of One Hundred Eighty-Five and 86/100 Dollars ($185.86), and was compelled to and did, on June 2, 1931, pay the second installment of said taxes in the sum of One Hundred Eighty-Five and 86/100 Dollars ($185.86). That said defendants failed and neglected to renew the fire insurance policy covering the dwelling house on said real property, and insuring the same against loss or damage by fire, and plaintiff was compelled to renew said insurance and did, on October 2, 1931, pay the sum of Thirty-two and 16/100 Dollars ($32.16) as a premium for [fol. 30] said renewal policy. That said defendants failed and neglected to pay the water charges levied and assessed against said property by the Salt River Valley Water Users' Association, and plaintiff was compelled to and did, on September 18, 1931, pay to said association the sum of Three Hundred Fifty-Six and 77/100 Dollars ($356.77), for and on account of said water charges, but that plaintiff has been fully reimbursed for said water charges. That under the terms of said mortgage plaintiff is entitled to interest on said sums of money from the respective dates on which the same were paid at the rate of eight per cent per annum. That no part of said sums has been repaid by said defendants to plaintiff, except said water charges as hereinabove set forth.

That it is provided in said mortgage that in the event of the failure of said mortgagors to pay any taxes or assess- [fol. 31] ments before the same become delinquent that the mortgagee may make said payments and the amounts so

paid shall be repayable at once without demand, and shall be secured by said mortgage.

That it is provided in said mortgage that in case of default of any of the obligations thereof the whole of the indebtedness secured by said mortgage might be declared payable and said plaintiff did, in the manner provided by law, declare the whole of said mortgage indebtedness due and payable on June 3, 1931, and duly notified said defendants herein, and said defaults were not made good as by law required.

4. That the said defendants Samuel S. Warner and Lydia S. Warner, his wife, pursuant to the provisions of the Federal Farm Loan Act, subscribed for stock in The Salt River Valley National Farm Loan Association in the amount of $360.00 and that the said The Salt River Valley National [fol. 32] Farm Loan Association, in turn, subscribed for an equal amount of stock in The Federal Land Bank of Berkeley, a corporation, plaintiff herein, which bank was the Federal Land Bank making said loan, and that the said Samuel S. Warner and Lydia S. Warner, his wife, exercised their option to borrow from The Federal Land Bank of Berkeley, through such association, the said sum of $360.00 necessary to pay for the shares of stock subscribed for by them in said The Salt River Valley National Farm Loan Association and that said sum of $360.00 was made a part of the face of the loan to be paid off in amortization payments. That said sum was deducted by plaintiff from said loan and retained by it and applied by it in payment for shares of stock purchased by the Salt River Valley National Farm Loan Association. That said defendants are entitled to an offset in the sum of $360.00 against the amount claimed by plaintiff to be due under the terms of [fol. 33] said note and mortgage.

5. That plaintiff is not entitled to include in its said judgment an attorney's fee in any amount.

6. That there remains unpaid upon said note and mortgage, which sum is now owing from the defendants who made said note and mortgage, and the defendant who guaranteed the same, the following sums:

Unpaid principal, less delinquent installments	$6,075.57
Interest thereon at 5½% per annum from May 1, 1930	617.22
Delinquent installment due November 1, 1930	234.00
Interest on said installment at 8% from said date	25.22
Delinquent installment due May 1, 1931	234.00
Interest on said installment at 8% from said date	15.86
State and County taxes for 1930, first installment	185.86
Interest thereon at 8% from December 15, 1930	18.16
State and County taxes for 1930, second installment	185.86
Interest thereon at 8% per annum from June 2, 1931	11.22
Fire Insurance premium	32.16
Interest thereon at 8% per annum from October 2, 1931	1.09

being a total of Seven Thousand Two Hundred Seventy-five [fol. 34] and 22/100 Dollars ($7,275.22) now due and owing to the plaintiff from Samuel S. Warner and Lydia S. Warner, his wife, who made said note and mortgage, and The Salt River Valley National Farm Loan Association, the defendant who guaranteed said note and mortgage, as herein found, after allowing the offset and credit of Three Hundred Sixty Dollars ($360.00) as herein provided, and that said defendants are personally liable for the debt.

That on motion of plaintiff's attorneys, said action is hereby dismissed as to First Doe, Second Doe and Third Doe.

Wherefore it is ordered, adjudged and decreed that plaintiff have judgment personally and severally against said Samuel S. Warner and Lydia S. Warner, his wife, and The Salt River Valley National Farm Loan Association, defendants, in the said sum of $7,275.22, together with inter- [fol. 35] est at the rate of five and one-half per centum per annum from the date of this decree until paid, and that the whole of said sum is a valid lien upon the land and premises and water stock in plaintiff's complaint and amended complaint, and hereinafter described and is secured by the mortgage mentioned in the complaint, and that said lien of plaintiff is prior to any lien or claim, or claims, of any of the defendants in said action.

It is further adjudged and decreed that all and singular the mortgaged premises and water stock mentioned in said complaint and amended complaint, and hereinafter described, or so much thereof as may be sufficient to raise the amount due the plaintiff in the sum of $7,275.22 as aforesaid, with interest as aforesaid, costs and accruing costs, be sold at public auction by the sheriff of Maricopa County, in the State of Arizona, in the manner prescribed by law and according to the course and practice of this [fol. 36] court, and that the said sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the said mortgaged premises and water stock; that said sheriff, out of the proceeds of said sale, retain his fees and disbursements of said sale and pay to plaintiff said sum of $7,275.22 with interest thereon as aforesaid, costs and any accruing costs, being the total amount due the plaintiff on the said note and mortgage.

It is further adjudged and decreed, that all of the right, title or interest or claim or lien in the said premises and water stock, or any portion thereof, of the defendants, and each of them, is subject to, inferior to, and subsequent to the lien of plaintiff under its mortgage, but that the lien of the plaintiff under said mortgage is subject to the lien for unpaid taxes assessed against said property herein-[fol. 37] after described, but is prior to the lien for any unpaid personal property taxes, or taxes on any other real estate.

That each of said defendants, and all persons having liens subsequent to said mortgage, their heirs, personal representatives and assigns, and all persons claiming to have acquired any estate or interest in said land and premises subsequent to the filing of said notice of the pendency of this action with the recorder, as aforesaid, be forever barred and foreclosed of and from all equity of redemption or claim of, in, or to, said mortgaged premises, and every part and parcel thereof after the delivery of said sheriff's deed.

It is further adjudged and decreed that the purchaser or purchasers of said mortgaged lands and premises at such sale be let into possession thereof, and that any person who since the commencement of this action has come [fol. 38] into possession under the defendants deliver pos-

session thereof to such purchaser or purchasers upon production of the sheriff's deed for such lands and premises, or any part thereof; and that in case the said purchaser or purchasers be refused such possession, a writ of assistance issue without further notice, requiring the sheriff of the county in which the lands are situated to place and maintain the said purchaser in the quiet and peaceable possession of the said lands and premises purchased by him, and the whole thereof.

It is further adjudged and decreed that if the moneys arising from the sale shall be insufficient to pay the amount so found due the plaintiff, as aforesaid, with interest and costs and expenses of sale, as aforesaid, the said sheriff shall specify the amount of such deficiency and balance due the plaintiff in his return of said sale, and that on the coming in and filing of said return the clerk of this court docket [fol. 39] a judgment for such balance against the defendants severally who made said note and mortgage, and who guaranteed said note and mortgage, as hereinbefore set forth.

It is further ordered, adjudged and decreed that any party to this suit may become a purchaser at said sale.

The property directed to be sold by this decree is situate in the County of Maricopa, State of Arizona, and is bounded and particularly described as follows, to-wit:

The North half of the Northwest quarter of Section 21, Township 1 South, Range 4 East, Gila and Salt River Base and Meridian, containing 80 acres, more or less.

Together with 76 shares in Salt River Valley Water Users' Association, said shares being appurtenant to the land.

Together with all other rights of every kind and nature, however evidenced, to the use of water, ditches and canals for the irrigation of said premises.

[fol. 40] Together with all tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

Done in open court this 5th day of March, 1932.

Joseph S. Jenckes, Judge.

IN SUPERIOR COURT OF MARICOPA COUNTY

MOTION FOR NEW TRIAL

Comes now the plaintiff in the above entitled action, and its attorneys of record, and moves the Court to vacate the Order for Judgment and the Judgment made herein on March 5, 1932, and to grant a new trial.

As grounds for the foregoing motion the plaintiff assigns the following causes:

1. Error in the admission of evidence offered by defendant over the objection of plaintiff.

2. That the judgment is not justified by the evidence [fol. 41] and is contrary to law.

Phillips, Holzworth & Phillips, Attorneys for Plaintiff.

IN SUPERIOR COURT OF MARICOPA COUNTY

Minute Entries

ORDER CONTINUING HEARING—November 2, 1931

Comes now the plaintiff by Phillips, Holzworth & Phillips, its Counsel. Thereupon, it is ordered by the Court continuing hearing on Order to Show Cause two weeks.

ORDER DENYING PETITION FOR APPOINTMENT OF RECEIVER—November 17, 1931

Comes now the Plaintiff by Phillips, Holzworth & Phillips, its Counsel, the Defendant appearing by Charles Woolf, his Counsel. Hearing is had on Motion for the appointment of a Receiver. It is ordered by the Court denying Petition for Appointment of Receiver.

[fol. 42] ORDER SUSTAINING DEMURRER—November 23, 1931

It is ordered by the Court sustaining Defendant's Demurrer and allowing Plaintiff twenty (20) days to amend.

ORDER DENYING MOTION TO STRIKE—January 11, 1932

Comes now the plaintiff by Phillips, Holzworth & Phillips, its Counsel, the Defendant appearing by Charles Woolf, his Counsel. Thereupon, it is ordered by the Court denying Defendant's Motion to Strike without prejudice to Defendant's raising matters presented by paragraphs 1 and 3 upon trial of the case. It is further ordered allowing 10 days in which to answer.

ORDER SETTING CAUSE—February 8, 1932

It is ordered by the Court setting this cause for trial for March 5, 1932.

ORDER GRANTING MOTION FOR ORDER REQUIRING PLAINTIFF TO PRODUCE RECORDS, ETC.—February 29, 1932

It is ordered by the Court granting Defendants' (Warner [fol. 43] et ux.) Motion for Order Requiring Plaintiff to Produce Records. It is further ordered denying Defendants' (Warner et ux.) Motion to Strike.

TRIAL—March 5, 1932

Comes now the Plaintiff by Phillips, Holzworth & Phillips, its Counsel, the Defendant appearing by Charles Woolf, his Counsel. Ralph Phillips is sworn and testifies. Plaintiff's exhibits "A", "B", "C", "D", "E", "F" and Defendants' exhibits "1", "2", "3", "4" and "5" are introduced in evidence and filed. Samuel S. Warner is sworn and testifies. Defendant's exhibit "6" introduced in evidence and filed. Thereupon it is ordered by the Court taking this matter under advisement.

JUDGMENT—March 7, 1932

This matter having been heretofore taken under advisement, it is now ordered by the Court that upon the presen- [fol. 44] tation of a formal written judgment by the Plain-

tiff, and its approval and signing by the Court, Judgment will be rendered in favor of the Plaintiff and against the Defendant as prayed for, less $360.00 claimed by defendant as offset and without attorney's fees.

ORDER DENYING MOTION FOR NEW TRIAL—March 21, 1932

It is ordered by the Court denying Plaintiff's Motion for New Trial.

ORDER STRIKING COST BILL, ETC.—April 25, 1932

It is ordered striking the Cost Bill. And it is further ordered that Defendants' (Warner et ux.) Objections to Form of Decree of Foreclosure is taken under advisement.

ORDER ON OBJECTIONS TO JUDGMENT—May 2, 1932

This matter having been previously taken under advisement, it is now ordered that Objections to Judgment are [fol. 45] sustained in part, as indicated on judgment form submitted.

ORDER EXTENDING TIME—May 25, 1932

Comes now the Plaintiff by Ralph Phillips, representing Phillips, Holzworth & Phillips, its Counsel. And thereupon, it is ordered extending time for filing transcript of Court Reporter's notes for thirty (30) days from this date.

IN SUPERIOR COURT OF MARICOPA COUNTY

NOTICE OF APPEAL

To Samuel S. Warner, also known as S. S. Warner, Lydia S. Warner, his wife, defendants, and Charles Woolf, attorney for defendants, notice is hereby given that the above

named Federal Land Bank of Berkeley, a corporation, appeals to the Supreme Court of the State of Arizona from the judgment rendered in the Superior Court of Maricopa County in the above entitled and numbered cause on the 5th day of March, 1932, and from the whole thereof.

Phillips, Holzworth & Phillips, Attorneys for Plaintiff.

[fols. 46–48] Bond on appeal for $200.00, approved May 18, 1932, omitted in printing.

[fol. 49] In Superior Court of Maricopa County

Reference to Exhibits

Plaintiff's Exhibits in Evidence

A. Promissory Note to The Federal Land Bank of Berkeley, dated November 1, 1922, signed by Samuel S. Warner and Lydia S. Warner.

B. Mortgage signed by Samuel S. Warner and Lydia S. Warner to The Federal Land Bank of Berkeley, dated November 1, 1922.

C. State and County Tax Receipt dated November 3, 1930, showing payment of taxes in amount of $185.86.

D. State and County Tax Receipt dated May 4, 1931, showing payment of taxes in amount of $185.86.

E. Receipt from Salt River Valley Water Users' Association showing payment of $356.77.

F. Receipt from Fidelity-Phenix Fire Insurance Company to The Federal Land Bank of Berkeley, dated October 6th, 1931, acknowledging receipt of $32.16.

[fol. 50] Defendants' Exhibits in Evidence

1. Photostatic copy of Check No. 3793 of The Federal Land Bank of Berkeley, dated Nov. 17, 1922, in amount of $6,819.50 payable to Arizona Title Guarantee & Trust Company for Samuel S. Warner.

2. Photostatic copy of Interest Refund Certificate dated Nov. 17, 1922.

3. Photostatic copy of Closed Loan Statement.

4. Photostatic copy of Authority to Disburse Funds, dated Nov. 28, 1922, signed by Samuel S. Warner and Lydia S. Warner.

5. Photostatic copy of Notice of Approval of Loan and Acceptance Notice of The Federal Land Bank of Berkeley.

6. Certificate No. 137. Receipt for Stock Held by Salt River Valley National Farm Loan Association.

[fol. 51] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 52] Clerk's certificate to opinion omitted in printing.

[fol. 53] IN SUPREME COURT OF ARIZONA

No. 3256

THE FEDERAL LAND BANK OF BERKELEY, a Corporation, Appellant,

vs.

SAMUEL S. WARNER, Also Known as S. S. WARNER, and LYDIA S. WARNER, His Wife, Appellees

Appeal from Superior Court of Maricopa County, Honorable Joseph S. Jenckes, Judge. Judgment Modified and Affirmed.

Phillips, Holzworth and Phillips, of Phœnix, and Richard W. Young, of Berkeley, California (of Counsel), Attorneys for Appellant.

Woolf & Carter, of Phœnix, Attorneys for Appellees.

Sanders, Childs, Bobb & Westcott, Everett Sanders and Edward F. Howrey, and Peyton R. Evans, all of Washington, D. C., and John Thorpe, of St. Paul, Minnesota, Amici Curiæ.

Ross, C. J.:

The plaintiff, The Federal Land Bank of Berkeley, on November 1, 1922, loaned the Warners, husband and wife, $7,200 on their note endorsed by the Salt River Valley National Farm Loan Association, a corporation, and secured [fol. 54] by a realty mortgage on lands situate in Maricopa County. The defendant mortgagors defaulted in the payments, also in keeping the taxes, water dues and insurance paid; hence this suit was brought to collect the note and foreclose the mortgage. The only defense was a claim to a set-off of $360. This the court allowed. The court also refused to allow the plaintiff an attorney's fee as stipulated in the mortgage. Plaintiff has appealed assigning as reasons therefor the allowance of the set-off and the refusal to allow an attorney's fee. We will consider these assignments in the order given.

If appears from the pleadings that the defendants (Warners), through the Salt River Valley National Farm Loan Association, applied to the Federal Land Bank of Berkeley for a loan, and that under instructions from them to the bank the latter paid the $7,200 borrowed from it as follows: $6,840 on defendants existing debts and $360, or 5% of loan, for borrowers membership stock in the Salt River Valley National Farm Loan Association. It is asserted by defendants that because this $360 membership fee in the association was used by the association in buying for itself an equal amount of the capital stock of the bank they should be given credit therefor.

The plaintiff and the Salt River Valley National Farm Loan Association, to which we shall refer, respectively, as the bank and the association, were organized under and pursuant to the terms and conditions of the Federal Farm Loan Act, passed by Congress July 17, 1916. Chap. 245, 39 Stat. 360; Title 12, U. S. C. A., Sec. 641 et seq. (Our references will be to U. S. C. A.) Both these corporations derive their charters and charter powers from said act. They are very essential parts of the machinery devised by the Congress [fol. 55] for the administration of a nationwide system of farm loans proposed to be set up thereby. This system consists of twelve Federal land banks for the United States, one for each of the twelve districts into which the country

has been divided. The plaintiff's district is the eleventh, composed of Arizona, California, Nevada and Utah. Each of these twelve banks is supplied with ample funds to lend the farmer who shows himself qualified to borrow. These funds are obtained by sale of the bank's capital stock, amounting to $750,000, to national farm loan associations and the government principally (Secs. 691, 692); and by the sale of farm loan bonds issued against first mortgages (Secs. 851-874).

The banks are authorized to make loans on the security of first mortgages on lands lying within their respective districts, such loans to be repaid by means of a fixed number of annual or semi-annual payments sufficient to retire the debt within an agreed period of not less than five nor more than forty years. The negotiations for loans are not carried on between the bank and the borrower but between the bank and a local farmers association representing the borrower. Ten or more natural persons who are the owners, or who are about to become the owners, of farm land qualified as security for a mortgage loan may unite to form one of these local associations and, if their application is satisfactory, the Federal Farm Loan Board will grant them a charter (Secs. 716-720).

These associations are distinct, separate, legal entities. They have a board of directors, a president, a vice president and a loan committee, and a secretary-treasurer who is the chief executive officer. They may contract debts and obligations, sue and be sued. One of the conditions of obtaining loans is that the association shall subscribe to the [fol. 56] capital stock of the bank 5% of the aggregate loans to its members, and pay the same in cash when the loans are made (Sec. 721). It shall also leave said capital stock with the bank as collateral security for the payment of loans. Upon full payment of mortgage loans this stock shall be paid off and retired. The farmer who obtains a loan from the bank through his association must subscribe 5% of his loan in the capital stock of his association and pay the same in cash (Sec. 733). This capital stock the association is authorized to hold as collateral security for the payment of loan. Upon full payment of loan the stock shall be paid off at par and retired.

Thus it is seen that the borrower is a stockholder in his association and that his association in turn is a stockholder

in the bank. The borrower is not a stockholder in the bank. The relation he and the bank sustain to each other is that of debtor and creditor and of course what he owes the bank cannot be reduced by what the association owes him or may owe him upon a settlement. The debts are not between the same persons or corporations or their assigns—an essential to the right of set-off or counterclaim.

Not only the association is obligated to the payment of the mortgage loan to the bank but all the members of the association are

"individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares" (Sec. 744).

Until the borrower redeems his membership stock in the association by the discharge of the mortgage debt he certainly has no right to have such stock, or a credit for it. Before he can claim such shares he must discharge the debt [fol. 57] for the payment of which they were pledged. To the extent of their value equity will hold and apply the borrower's shares on the debts of the association and the double liability of his fellow-stockholders in the association.

The rights of a borrower under the act in the stock of the bank subscribed for by a National Farm Loan Association were involved in Byrne v. Federal Land Bank of St. Paul, 61 N. D. 265, 237 N. W. 797, and it was there held that the borrower had no interest in said stock; that it was an asset of the association and could be applied by the bank upon what the association owed it, and that the bank's relation to the borrower was that of a creditor only. That this is the correct view we have no doubt. See, also, Gantt v. Gunter (Ala.), 145 So. 146.

The mortgage contained the following provision:

"(10) That in case of institution of suit to foreclose this mortgage, the mortgagors shall pay, as a part of the debt hereby secured, all costs and legal expense and reasonable attorney's fee to be fixed by the Court, and that said attorney's fee is and shall be a lien upon said premises and secured by this mortgage * * *."

The plaintiff asked for $125 as a reasonable attorney's fee. We think unless the act under which this system of borrowing is authorized either expressly or impliedly forbids the lender from collecting a reasonable attorney's fee for foreclosure, under the decisions and practice in this jurisdiction the contract is enforceable and plaintiff is entitled to a reasonable attorney's fee. We have frequently recognized and enforced contracts to pay attorneys' fees in foreclosure proceedings. O. S. Stapley Co. v. Rogers, 25 Ariz. 308, 216 Pac. 1072; Maxey v. Somerton State Bank, 22 Ariz. 371, 197 Pac. 894; Amirault Estate, 22 Ariz. 122, [fol. 58] 194 Pac. 1099; McClintock v. Bolton, 6 Ariz. 370, 57 Pac. 611. In this respect we are in line with the great majority of the courts. 41 C. J. 415, sec. 264. Attorneys' fees are not costs because they are not provided for or fixed by law. They are the result of contract between the parties whereby, in consideration of the mortgage loan, the mortgagor agrees to repay the principal, interest, etc., and, in case suit is brought to collect, to pay the mortgagee a reasonable attorney's fee. In other words, the mortgagor assures the mortgagee that he will be put to no outlay for attorney's fees in collecting his debt.

Section 3840, Revised Code of 1928, reads as follows:

"Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto * * *"

Counsel for plaintiff and amici curiæ argue that the word "damages" is broad enough to include an attorney's fee, and that its association with the words "debt" and "costs" shows that to be its intendment. Just what the word was intended to cover it is difficult to say. It could include taxes, water dues, insurance, or any other outlay the mortgagee is put to to protect his mortgage lien, and it might reasonably include any expenses forced on the mortgagee through default of the mortgagor, such as attorney's fees. At all events, the stipulation in the mortgage to pay an attorney's fee when it was put in there was legal, and is still legal, under the decisions and laws of this state.

While a Federal farm loan mortgage is a matter of contract between the parties, incorporated in every such contract are the terms and conditions of the Federal Farm Loan Act. The act is a part of such contract and controls [fol. 59] where there is any conflict between it, the state laws, or the contract. Scott v. Federal Land Bank, 92 Ind. App. 249, 175 N. E. 16. For instance, if the act forbids the inclusion in the mortgage contract of a stipulation to pay an attorney's fee in case of foreclosure, the stipulation would be unenforceable. The defendants contend that is the situation, whereas plaintiff and the amici curiæ contend that the limitations of the act on the costs and expenses to be charged and collected from the borrower are those for the administration of the act by the Federal Farm Loan Board and its different agencies in the process of making the loan, and in its collection through such agencies; and that such limitations do not extend to or have anything to do with the expenses of collection when resort is had to the courts.

The question is presented for the first time and involves the construction of the Federal Farm Loan Act. The language of the act nowhere specifically or directly authorizes the bank to contract for or collect an attorney's fee in case of a foreclosure, nor does it specifically forbid such contract. But that the general policy of the act is to protect the borrower and to limit the expenses incident to his loan to a minimum there can be no doubt. The central thought seems to have been the inauguration of a system of loans for the farmer, under the supervision and control of the national government, shorn of the penalties, exactions, bonuses, commissions and charges to which he had been theretofore exposed and against which he was helpless to protect himself. Every detail, from the initial application for a loan to the liquidation thereof, is under the control of the Federal Farm Loan Board and its agencies, whose duties and powers are pretty well defined. The principal of such agencies is the lending bank. Section 781 of the act provides that such bank "shall have power * * *

[fol. 60] "Ninth. * * * To charge applicants for loans and borrowers, under rules and regulations promulgated by the Federal Farm Loan Board, reasonable fees not exceeding the actual cost of appraisal and determination of

title. Legal fees and recording charges imposed by law in the State where the land to be mortgaged is located may also be included in the preliminary costs of negotiating mortgage loans. The borrower may pay such fees and charges or he may arrange with the Federal land bank making the loan to advance the same, in which case said expenses shall be made a part of the face of the loan and paid off in amortization payments. Such addition to the loan shall not be permitted to increase said loan above the limitations provided in section 771."

Thus there is conferred on the bank the right to collect from the borrower actual costs of appraising his land and determining the title thereof and other specific preliminary costs of the loan. This section limits the bank's charges against the borrower to certain specific items of costs and expenses incurred preliminary to the loan. These are initial costs. The specific grant of authority to collect these initial costs, while exclusive as to them, does not necessarily carry a denial of authority in the bank to collect from the borrower other costs or costs incident to the protection of the mortgage or its collection.

But after stating what the bank may charge to the borrower the act undertakes to state what may not be charged to him, and the language used for that purpose is very sweeping. It could not be more so. It says, in effect, that the bank is without power to demand or receive, under any form or pretext, any commission or charge not specifically authorized in the act (subdv. 5, Sec. 791). If plaintiff's position is sustained, it will have both demanded of and received from the borrower an attorney's fee. It makes no difference, however, what it is called if it is a charge or a commission. Its name or form is immaterial, as also the reason it is demanded or received. The main thing is, is it a commission or a charge. If it is the bank has no [fol. 61] power to demand or receive it. Speeter v. United States, 42 Fed. (2d) 937. No one would contend that an attorney's fee is a commission, we apprehend, and it would seem that no one would claim that an attorney's fee is not a charge. The word "charge" is very much more comprehensive than the word "commission". Commission ordinarily refers to the compensation paid to an agent or servant for services performed. As we interpret the word

"charge" or "charges" as here used, it is intended to cover any burden or exaction not specifically authorized, demanded or received by the bank from the borrower. Appraisal costs, costs of abstract of title, including a fee for its examination, and costs of recording are classed as "charges" or "fees" in subdivision ninth of Section 781, supra. They are, except the item for recording, matters of contract, just as attorney's fees are.

Section 983 contains this restriction:

"No land bank * * * shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized."

The identical thing forbidden, to wit, a fee, was contracted for in the mortgage and is now being demanded of the borrower. Such a fee is not "specifically authorized" but is inferentially forbidden by the act.

The matter of penalty for default in making payment when due is not overlooked or ignored. The act (subdv. 9, Sec. 771) provides that if payments are defaulted they shall bear 8% per annum simple interest, and that if taxes, liens, judgments or assessments are not paid the mortgagee may pay them and receive thereon 8% per annum simple interest. Thus the practice of increasing and compounding the interest on deferred payments, common to mortgages between private loan companies and borrowers, [fol. 62] was noticed and impliedly forbidden. Only simple interest may be charged. The reason the provision concerning attorney's fees, common to such mortgages, is not specifically mentioned or noticed is doubtless because the Congress believed such expense was an overhead taken care of under "administration". It would be exceedingly strange that the Congress should have taken pains to restrict and limit the expenses of the borrower in all the respects to which he had been theretofore exposed except the one of attorney's fees. The Federal Farm Loan Board is empowered and authorized to employ a permanent staff of attorneys, experts, assistants, etc., and to fix their compensation (Sec. 659). The Federal land banks have authority to elect their officers and appoint their employees and define their duties (Sec. 676), also to fix their compensation, subject to the approval of the Federal Farm Loan Board (Sec. 683). The failure of the act to specifi-

cally authorize the bank to contract with the borrower for an attorney's fee would lead one to believe that the Congress probably intended the bank's permanent staff of attorneys should perform that service.

In addition to the preliminary costs and expenses that may be collected from the borrower, as provided in Section 781, supra, it is specifically provided in subdivision second of Section 771:

"Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan * * * second, a charge for administration and profits at a rate not exceeding 1 per centum per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage; * * * *"

This one per centum for "administration and profits" the bank is specifically authorized to collect from the bor- [fol. 63] rower. Plaintiff and amici curiæ would restrict the meaning of the word "administration" to the act of collecting the interest on the mortgage and the amortized payments on the principal, so long as they were voluntarily made by the borrower, and stop there. They seem to claim that when the borrower defaults in his payments, and resort must be had to the courts, administration ceases in the sense used in this act. In other words, that the one per centum on the unpaid principal, while covering "profits", does not cover the entire "administration".

The plaintiff and amici curiæ take the position that this form of contract has been in use by all the different farm banks for some sixteen years, with the authority and approval of the Federal Farm Loan Board; that Sections 971-973 of the act make it the duty of the farm loan commissioner to investigate the laws of the states and report to the board; and the board is forbidden to make any loans in any state unless the laws

"are such as to assure the holder thereof (of mortgage) adequate safeguards against loss in the event of default on loans secured by any such mortgages."

For these reasons, they say, the board's interpretation of the law should be followed "unless convincing reason to the contrary is found in the language or purpose of the enactment". We agree with this rule of interpretation, but think

both the language of the act and its purpose forbid the contract for attorney's fees.

It is also said if plaintiff is not allowed to collect an attorney's fee the bank will sustain a "loss", contrary to the manifest intention of Sections 971-973. This depends. If the act permits the making of the contract with the mortgagor for an attorney's fee, then the deduction is correct, [fol. 64] but if it forbids such a contract then nothing is either lost or gained by its rejection.

They also seem to place some sanctity or virtue in the first sentence of Section 642, reading as follows:

"Wherever the term 'first mortgage' is used in this Chapter it shall be held to include such classes of first liens on farm lands as shall be approved by the Federal Farm Loan Board, and the credit instruments secured thereby."

This language defines a first mortgage and makes it a prerequisite that it shall be approved by the Federal Farm Loan Board, but we do not understand therefrom that such approval would make legal unauthorized or illegal conditions inserted therein.

We conclude that the cause should be remanded with directions to modify the judgment by adding thereto the item of $360 allowed as a set-off; and that as thus modified the judgment should be affirmed.

Henry D. Ross, Chief Justice.

Concurring: A. G. McAlister, Associate Justice. Fred W. Fickett, Superior Judge.

Note.—On account of the illness of Judge Lockwood, Honorable Fred W. Fickett, Judge of the Superior Court of Pima County, was called to sit in this case.

[fol. 65] In Supreme Court of Arizona

Mandate

(Seal.)

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa, Greeting:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between The Federal Land Bank of Berkeley, a

corporation, Plaintiff, vs. Samuel S. Warner, also known as S. S. Warner, and Lydia S. Warner, his wife, Defendants, No. 35727, the said superior court made and entered its judgment, on the 5th day of March, 1932, being a decree of foreclosure on the mortgaged premises described therein, an order refusing to allow plaintiffs an attorneys' fee in the case, and the allowance to defendants of a set-off of [fol. 66] $360.00 as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiff agreeably to the law in such case made and provided fully and at large appears.

[fol. 67] And whereas, in May, in the year of our Lord one thousand nine hundred and thirty-three, the said cause came on to be heard before the said Supreme Court and was submitted for decision after oral argument.

On consideration whereof, it was on the first day of July, in the year of our Lord one thousand nine hundred and thirty-three, ordered by this Court that the judgment of the said Superior Court in this cause, dated March 5th, 1932, be, and the same is hereby modified by adding thereto the item of $360.00 allowed as a set-off, and that, as thus modified, the judgment is affirmed. Ordered further that the Federal Land Bank of Berkeley, a corporation, appellant herein, recover its costs in this court of and from said appellees, Samuel S. Warner et al.

[fol. 68] You therefore are hereby commanded that such proceedings be had in said cause, as according to right and justice, and to law, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Henry D. Ross, Chief Justice of the Supreme Court of the State of Arizona, the seventeenth day of July, in the year of our Lord one thousand nine hundred and thirty-three.

Eugenia Davis, Clerk of the Supreme Court of the State of Arizona.

Costs of Appellant (no cost bill filed).

[Endorsed:] No. 3256. Supreme Court of the State of Arizona. The Federal Land Bank of Berkeley, a corporation, appellant, vs. Samuel S. Warner et al., appellees. Copy of mandate. Issued 7/17, 1933.

Certificate

State of Arizona,
Supreme Court, ss:

I, Eugenia Davis, Clerk of the Supreme Court of the State of Arizona, do hereby certify and attest the within and following to be a full, true, and correct copy of the original Mandate of this court issued to the trial court on the 17th day of July, 1933, in Case No. 3256, The Federal Land Bank of Berkeley, a corporation, Appellant, v. Samuel S. Warner et al., Appellees, duplicate of which is on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Phœnix, this 26th day of September, 1933.

Eugenia Davis, Clerk, Supreme Court of the State of Arizona. (Seal Supreme Court, State of Arizona.

Endorsed on cover: File No. 38,101. Arizona Supreme Court. Term No. 498. The Federal Land Bank of Berkeley, petitioner, vs. Samuel S. Warner et ux. et al. Petition for a writ of certiorari and exhibit thereto. Filed September 30, 1933. File No. 498 O. T. 1933.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 20, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Arizona is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.